NOMINATION OF STEPHEN J. SWIFT

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

NOMINATION OF

STEPHEN J. SWIFT TO BE A JUDGE TO THE U.S. TAX COURT

JULY 13, 1983

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NOMINATION OF STEPHEN J. SWIFT OF CALIFORNIA TO BE A JUDGE OF THE U.S. TAX COURT

WEDNESDAY, JULY 13, 1983

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:55 a.m., in room SD-215, Dirksen Senate Office Building, the Honorable Bob Dole (chairman of the committee) presiding.

Present: Senators Dole and Symms.

[The press releases announcing the hearing and the prepared statement of Senator Robert J. Dole follow:]

FINANCE COMMITTEE SCHEDULES HEARING ON THE NOMINATION OF STEPHEN J. SWIFT TO BE A JUDGE TO THE U.S. TAX COURT

Robert J. Dole (R., Kans.), Chairman of the Committee on Finance, announced today that the Committee has scheduled a hearing on the nomination of Stephen J. Swift to be a Judge of the United States Tax Court.

The hearing is scheduled for Wednesday, July 13, 1983 following the completion of the Committee's executive session on spending reduction proposals. It will be held in Room SD-215, Dirksen Senate Office Building.

Immediately following the hearing, the Committee will meet in executive session to consider the nomination.

STATEMENT OF SENATOR DOLE, CONFIRMATION HEARING, STEPHEN J. SWIFT, U.S. TAX COURT

I am pleased today, for the second time in recent weeks, to welcome to the committee an outstanding nominee by President Reagan to be a Judge of the U.S. Tax Court. Like Mr. Charles Clapp, whom the committee and the Senate approved in June, Stephen J. Swift appears to have outstanding credentials for this important position.

Mr. Swift has been senior tax counsel in the tax department of Bank of America N.T. and S.A. since 1977. His responsibilities there have provided him with a wide range of expertise in the corporate, pension, and individual tax fields. Prior to joining the Bank of America, he served for several years first in the Tax Division of the Justice Department, and then as an assistant U.S. attorney for tax matters in northern California. Mr. Swift is an honors graduate both of Brigham Young University and George Washington University Law School.

All members of the committee have been provided with the biographical material of the nominee. Judge Tamm of the Judicial Ethics Committee has reviewed the financial disclosure forms, and the committee's chief counsel has reviewed his net worth statement for any possible conflict of interest. I am satisfied that there are no problems in this area.

The résumé of Mr. Swift enumerates a number of tax cases in which he has been involved. Judging from his record of success in tax litigation, I believe that Mr. Swift will do an outstanding job from the other side of the bench.

The CHAIRMAN. First let me apologize for being a little bit late. We have a large group of high school students in the corridor, so I was visiting with my Kansas constituents.

We are pleased today for, I might say, the second time in the past couple of weeks to welcome to the committee an outstanding nominee by President Reagan to be a judge of the U.S. Tax Court.

Like Mr. Charles Clapp, whom the committee and the Senate approved in June, Stephen J. Swift appears to have outstanding credentials for this important position. Mr. Swift has been a senior tax counsel in the tax department of the Bank of America since 1977. His responsibilities there have provided him with a wide range of expertise in the corporate, pension, and individual tax fields.

We have supplied to all the members of the committee biographical materials which I am certain have been reviewed by members and their staffs. Judge Tam of the Judicial Ethics Committee has reviewed the financial disclosure forms and the committee's chief counsel has reviewed his net worth statement for any possible conflicts of interest.

I am satisfied that there are no problems in this area. The résumé of Mr. Swift enumerates a number of tax cases in which he has been involved, and judging from that record of success in litigation I certainly believe that he will do an outstanding job on the other side of the bench.

We are very pleased to have Senator Wilson with us today to introduce the nominee. Maybe you can both come forward. Do you have any statement at this time, Senator Symms?

Senator SYMMS. Mr. Chairman, I have no statement, only to say that I welcome the opportunity to be here with you this morning and welcome Mr. Swift and our colleague, Pete Wilson here. May I just make one comment to Mr. Swift.

I think that probably, from what I understand, that he will be approved by the Senate and I would just say that I hope we can at least have one point of view presented here this morning. One thing that really bothers me about the whole operation of the Internal Revenue Service is that they always seem to act like you are guilty until you can prove yourself innocent.

In the rest of our law, you are innocent until proven guilty, and I hope that on the Tax Court we could get more people, at least on the court, that understand that the taxpayers do have some rights, too, and I think they have been sadly mistreated in the last 25 years by the Federal Government in that respect.

I know it is because of compliance, and enforcement, and problems of collecting moneys, but I know that most of the taxpayers in the country I talk to have a great deal of resentment for the treatment they get from the Internal Revenue Service, and I suppose some quick, expeditious rulings in the Tax Court might be helpful to solve some of those problems.

The CHAIRMAN. Senator Wilson.

STATEMENT OF THE HON. PETE WILSON, MEMBER OF THE U.S. SENATE FROM CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman.

It is my privilege this morning to introduce to the committee Stephen Jensen Swift, who, as the chairman has already noted, is a most distinguished candidate. His very extensive experience both in private practice and as a trial attorney in the honors program for the tax division in the Department of Justice, as well as assistant U.S. attorney in the tax division in San Francisco, have led him to be a candidate for this high honor.

Steve's undergraduate work led him to graduate in the top 10 percent of his class from Brigham Young University. He was an honors graduate from George Washington University Law School. His experience and training have prepared him thoroughly, I think, to assume this position.

I might say that my Judicial Selection Advisory Committee, in ascertaining his reputation for good character and judicial temperament, found that he was not just well recommended, but very highly thought of, and it gave him the very highest recommendation.

So I am here this morning to express my full support for this nominee. I think that his appointment will reflect great credit on the administration, and I suspect, Senator Symms, probably add to the tax bench someone who shares your philosophy with respect to equal justice under the Internal Revenue Code.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Wilson, we appreciate very much your statement and your endorsement of the nominee. It will be very helpful to the committee.

Mr. Swift, we are ready. Do you have a statement, or are you ready for some hard questions, or would you rather have neither?

STATEMENT OF STEPHEN J. SWIFT, OF CALIFORNIA, JUDGE-DESIGNATE OF THE U.S. TAX COURT

Mr. SWIFT. I would just like to say, Senator Dole and Senator Symms, that I have worked on both sides of the aisle, so to speak, with the Government—in the Department of Justice and in the U.S. attorney's office for 7 years, and represented the Internal Revenue Service in the Federal district courts—and then with the Bank of America represented the taxpayers, and won and lost cases on both sides of that fence, and do recognize that the Internal Revenue Service can be wrong on occasion and that there are certainly two sides to most issues.

Thank you. I am available for any questions that you may have.

[Résumé of Stephen J. Swift follows:]

RÉSUMÉ OF STEPHEN J. SWIFT

Employment experience—Assistant United States Attorney, Tax Division, United States Attorney's Office, San Francisco, California 94102, May, 1974, through April, 1977. Responsible for all phases of litigation of civil and criminal tax suits in Federal and state courts in Northern California.

Grader for Bay Area Review Course of its practice bar exam questions. May, 1975 to April, 1977.

Trial Attorney, Honors Program, Tax Division United States Department of Justice, Washington, D.C. July, 1970 through April, 1974. Responsible for all phases of litigation of civil tax refund suits in the Federal district courts of Missouri, Nebraska, Kansas, Arizona, Colorado, Wyoming, Nevada, and Utah. Cases involved all types of taxes—individual and corporate income, excise, employment, wagering, civil

fraud penalties, and estate and gift taxes. Worked primarily under the supervision of Stanley F. Krysa and Jerome Fink.

Legal Assistant, Department of Justice, Tax Division. Legal Research and trial preparation. Full time summer of 1969 and part time September, 1969 through June, 1970 in the Office of the Deputy for Refund Litigation, Mr. Abbott M. Sellers, primarily under the supervision of Special Assistant for Civil Trials, Mr. Arthur I. Biggins.

Law Clerk from October, 1967 to May, 1969 with the law firm of Koteen & Burt, Washington, D.C.

Dormitory Resident Assistant. George Washington University, Washington, D.C. September, 1968 to June, 1970. This position involved counseling the under-graduate students and handling the administrative problems of the dormitory. There were approximately 140 residents.

Education—J. D. George Washington University Law School. Graduated in June of 1970 with honors. B.A., 1967 Brigham Young University. Major: Political Science; Minor: German. Graduated in top 10% of class and was on the Dean's List. San Jose State College—1966. Attended two semesters and was on the Dean's List.

University activities—Vice President of the International Relations Club. German Club.

Background—Was raised on the San Francisco Peninsula. Attended Hillview Elementary School and Menlo Atherton High School in Menlo Park, California. I interrupted my undergraduate studies for two-and-a-half years to serve a Mission for the Mormon Church in Germany.

Interests—Primarily interested in outdoor activities, sports, and reading. Also enjoy social work; *e.g.*, I participated in the Big Brother Program in the District of Columbia.

References—Jerome Fink, Esquire, Schwalb, Donnenfeld, Bray & Silbert, 1333 New Hampshire Ave., N.W., Suite 350, Washington, D.C. 20036, Telephone: (202) 857-0970; Stanley F. Krysa, Chief, Criminal Section, Tax Division, U.S. Department of Justice, 10th and Pa. Ave., N.W., Rm. 4611, Washington, D.C. 20530, Telephone: (202) 633-2973.

Federal judges—The Honorable John P. Wiese, United States Court of Claims, 717 Madison Place, N.W., Washington, D.C. 20005, (202) 633-7253; The Honorable Aldon J. Anderson, United States District Court for the District of Utah, 350 South Main Street, Salt Lake City, UT 84101, (801) 524-5625; The Honorable Spencer Williams, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, (415) 556-3191; The Honorable Alfonso J. Zirpoli United States District Court for the Northern District of Calif., 450 Golden Gate Avenue, San Francisco, CA 94102, (415) 556-3191; The Honorable Samuel P. Conti, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, (415) 556-3031.

PARTIAL LIST OF LITIGATION HANDLED IN THE FEDERAL COURTS BY STEPHEN J. SWIFT, JULY 19, 1982

(1) *Bank of America* v. *United States,* 1981-1 U.S.T.C. par. 9161 (Ct. Cl. Trial Judge's Decision).

Negotiation, confirmation and acceptance commissions earned by a bank in connection with letter of credit financing were governed for source-of-income purposes by the location of the credit risks assumed by the bank. In ruling in the bank's favor, Trial Judge Wiese rejected the government's argument that the commissions represented income from personnel services and agreed with the Bank that financing through letters of credit and bankers' acceptances is analogous to direct loan financing and therefore the commissions should be governed by the interest source-of-income rule. The Trial Judge's decision on confirmation and acceptance commissions was recently affirmed on appeal by the government to the full Court of Claims. (Decision rendered June 2, 1982, Docket No. 402-71)

(2) *Bank of America* v. *United States,* 79-2 U.S.T.C. par. 9699 (C.D. Calif.).

The Bank's security interest in a hospital's accounts receivable had priority over an IRS tax lien. Even though the bank's interest had been perfected under the California Uniform Commercial Code prior to the creation of the tax lien, the government argued that a California statute precluding assignments to third parties of the particular accounts receivable involved made the bank's interes inchoate under federal law and therefore junior to the IRS lien. The court rejected this argument and held that if a creditor has taken all necessary steps under state law to perfect his interest in the property of the debtor, the creditor need not also satisfy the federal choateness doctrine.

(3) *Bank of America* v. *Guam*, 79-1 U.S.T.C. par. 9232 (D.C. Guam).

The District Court of Guam held that the bank's Guam branch was not liable for withholding taxes under I.R.C. Section 1441 for interest payments which a debtor (the former governor of Guam) made to a Hong Kong subsidiary of the bank. Merely because the bank made the interest payments, did so at the debtor's instructions and out of the debtor's account at the bank's Guam branch, the bank did not have sufficient control over the payments to be treated as the withholding agent.

(4) *Bank of America* v. *Blaz*, 1977-1 U.S.T.C. par 9287, aff'd by C.A. 9 in unpublished opinions.

Interest income earned by the bank in the U.S. government securities was not effectively connected to the bank's business activities in Guam even though the securities were used as collateral for Government of Guam public deposits in the bank's Agana branch.

(5) *Bank of America* v. *United States*, 79-1 U.S.T.C. par. 9170, (N.D. Calif.).

The bargain sale by a subsidiary of its overseas branches to the bank was held to be eligible for the non-recognition treatrment of I.R.C. Section 311 end not subject to a Section 482 adjustment. The court held that Section 482 could only override a non-recognition provision of the Code where some abuse of the non-recognition provisions was present.

(6) *Bank of America* v. *United States*, 78-2 U.S.T.C. par. 9493 (N.D. Calif.).

The Federal District Court in San Francisco held that a taxpayer could obtain, under the discovery provisions of the Federal Rules of Civil Procedure, the government's background file reflecting the development and finalization of Treasury Regulations under I.R.C. Section 482.

The court adopted the bank's position that the test for disclosure of government records under the Freedom of Information Act should be applicable to discovery disputes under the Federal Rules of Civil Procedure. That test requires the production of all internal government records of a factual nature, as well as records containing analytical material to the extent such analytical records are intended as "explanatory" of the rules and regulations finally adopted. In order to be protected from discovery the records must pre-date the finalization of the government's position on the issue and be deliberative, rather than explanatory, in nature.

(7) *Bank of America* v. *United States*, 78-2 U.S.T.C. par. 9588 (Ct. Cls.).

The trial judge and the court held that the government was precluded from raising an offset issue. The government's attempt to amend its answer and raise the new issue (the treatment for source-of-income purposes of acceptance discount income) was dilatory and prejudicial to the bank. Significant to the government's right to raise an offset issue was the court's statement that a taxpayer's showing of undue delay on the part of the government in raising new issues establishes a prima facie showing of prejudice to the taxpayer and no showing of specific prejudice must be made.

(8) *The Hibernia Bank* v. *United States*, 75-2 U.S.T.C. par. 13,102, aff'd 78-2 U.S.T.C. par. 13,261 (9th Cir.).

Post death interest expenses incurred by an estate were not reasonable expenses of administration and therefore were not deductible under I.R.C. Section 2053.

(9) *Donia Smith* v. *United states*, 76-2 U.S.T.C. par. 9621 (N.D. Calif.), aff'd *per curiam* 79-1 U.S.T.C. par. 9248 (9th Cir.).

An I.R.S. levy on funds seized from a safe deposit box was valid. Contrary to plaintiff's trial testimony, the credible evidence demonstrated that the taxpayer owned the property in question and it was therefore subject to seizure to pay the taxpayer's delinquent tax liabilities.

(10) *Colorado Springs National Bank* v. *United States*, 73-2 U.S.T.C. par. 9795 (D.C. Colo.), aff'd 74-2 U.S.T.C. par. 9809 (10 Cir.)

A one-time membership fee in the Master Charge credit card association was a non-duductible capital expenditure. Other miscellaneous expenses of starting up its credit card operation were deductible by the bank.

(11) *Rav C. Imel* v. *United States*, 73-1 U.S.T.C. par. 9617; 74-1 U.S.T.C. par. 9459 (D.C. Colo.), aff'd 75-2 U.S.T.C. par. 9698 (10 Cir.).

A wife's interest acquired upon divorce in her husband's separate property was held, for federal income tax purposes, to constitute quasi-community property. This allowed the husband to avoid recognition of appreciation in the value of the property which was transferred to the wife pursuant to Colorado divorce proceedings.

(12) *Great Lakes Pipeline Co.* v. *United States*, 73-1 U.S.T.C. par. 9158 (W.D. Mo.), aff'd *per curium* by the Tenth Circuit.

Expenses incurred at the time of a Section 337 liquidation were not deductible since they related primarily to the sale of assets, not to the liquidation.

(13) *John A. Kroh* v. *United States*, 73-1 U.S.T.C. par. 9141 (D.C. Kan.).

A second examination of taxpayer's books and records did not occur. Furthermore, even if an unauthorized second examination had occurred, it would have had no effect cn the tax deficiency.

(14) *Eleanor Quick* v. *United States*, 73-2 U.S.T.C. par. 9742 (D.C. Colo.), aff'd 74-2 U.S.T.C. par. 9700 (10 Cir.).

The estate tax deduction provided by I.R.C. Section 691(c) was applied against the sum of the net long-term capital gain (after the Section 1202 50% capital gains deduction) and ordinary income.

(15) *John Emberton* v. *United States*, 73-2 U.S.T.C. par. 9575 (D.C. Nev.), aff'd in unpublished opinion January 22, 1975 (9th Cir.).

Daily expenses of traveling from their homes in Las Vegas to the remote Nevada Test Site were non-deductible commuting expenses.

(16) *Thayn, Estate of Joseph K.* v. *United States*, 1974-2 U.S.T.C. par. 13,025 (D.C. Utah).

The amount of the marital deduction was properly reduced by the wife's share of estate taxes attributable to the property she received from the decedent.

(17) *Anderson* v. *United States*, 78-1 U.S.T.C. par. 9389 (D.C. Calif.).

An employee's dominant intent in making certain loans was for business purposes and losses with respect therto were ordinary. The dominant intent in making other loans was for investment pruposes and losses on those loans were treated as capital losses.

(18) *Kelson* v. *United States*, 73-2 U.S.T.C. par. 9565 (D.C. Utah), rev'd 74-2 U.S.T.C. par. 9714 (10 Cir.).

Alleged supplemental and informal claims for refund were allowed by the district court (per Judge Willis Ritter) but disollowed by the Tenth Circuit.

(19) *United States* v. *Woodrow F. Morgan*, (N.D. Calif. 1976).

This was a successful 23 count criminal tax prosecution against an income tax return preparer. Charges were brought under Section 7206(1) and (2).

(2) *United States* v. *Johnny Chang*, (N.D. Calif. 1975).

This case involved a four year tax evasion prosecution under Section 7201. The defendant was convicted on three counts. The specific item method of proof was utilized.

The CHAIRMAN. I just have a few very brief questions. If Senator Wilson has other business, we were happy to have you here.

Mr. Swift, I understand your wife is here. We would like to acknowledge her presence for the record and any other family members.

Mr. SWIFT. Yes. I have the Clark family from McLean, Va., and other professional friends, Mary Leeding from Senator Hatch's office, and Andrew Poat from Senator Wilson's office. I appreciate them being here.

The CHAIRMAN. Have you discussed potential conflicts of interest with the committee's chief counsel?

Mr. SWIFT. Yes, I have.

The CHAIRMAN. And were there any problems? I understand you had no conflicts. You are satisfied there are no conflicts?

Mr. SWIFT. I am satisfied there are no conflicts.

The CHAIRMAN. If confirmed, will you make Washington, D.C., your principal residence?

Mr. SWIFT. Yes, the Washington metropolitan area. We made an offer on a home this morning and I hope by now it is accepted, in McLean.

The CHAIRMAN. I think one of the major problems, in addition to the general concern that Senator Symms expressed, is the backlog of cases currently estimated at 50,000; 16,000 alone involve tax shelters. Now you are going to be asked to help reduce that backlog.

I do not know whether you have any preconceived notions on how you might approach that, but do you have any ideas on how you can work that backlog down?

Mr. SWIFT. I think the most important thing that I have identified up to this point in time as a trial attorney would be that the judge needs to be involved in the most difficult cases early on, and the Tax Court has not always done that as much as perhaps they should. I would hope to be an advocate of an earlier assignment of the major difficult cases as soon as possible after filing and the judge's involvement in the pretrial stages of the difficult cases.

I think that will significantly move those cases along and allow the judges to get to the volume of all of the other cases.

The CHAIRMAN. With that backlog, I do not know how you would approach it, but I would assume with some trepidation.

Do you think the standards for tax litigators are high enough to provide for fair representation and efficient administration of the Tax Court?

Mr. SWIFT. Yes; my experience in the Tax Court is that the district counsel, formerly the regional counsel, attorneys are generally well prepared and work hard. The volume does affect sometimes the quality of their presentations, but generally I think that they are adequate and competent and do a good job representing the Internal Revenue Service.

The CHAIRMAN. I am not familiar enough with it to know what kind of a schedule they keep or whether there are a lot of delays. There must be a lot of delays, they have that much of a backlog. It may not be the court's problem.

Mr. SWIFT. Well, in San Francisco I ride home with them frequently at 8 and 9 in the evening on the BART train from San Francisco out to the East Bay, and there frequently are a number of district counsel attorneys going home that late, and I believe they work very hard in my experience.

The CHAIRMAN. I have no further questions. Is there anything else you would like to state for the record?

Mr. SWIFT. No, Senator Dole.

The CHAIRMAN. Senator Symms.

Senator SYMMS. No questions, Mr. Chairman. I wish you the best success.

Mr. SWIFT. Thank you very much. I am looking forward to this opportunity.

The CHAIRMAN. What we will do, if there is no objection—I do not believe there would be any objection—is to poll your nomination, and hopefully be able to report it soon so that it may be acted upon if not this week early next week.

Thank you very much.

Mr. SWIFT. Thank you.

[Whereupon, at 11:05 o'clock a.m., the committee adjourned, to reconvene upon the call of the Chair.]

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